



**GAE Committee
Public Hearing
February 29, 2016**

**TESTIMONY OF SECRETARY OF THE STATE DENISE W.
MERRILL REGARDING:**

- **Raised Bill 5387, AN ACT CONCERNING THE CIRCULATION OF NOMINATING PETITIONS**
- **House Bill 5388, AN ACT CONCERNING THE TOWN SCHOOL COMMITTEE IN THE TOWN OF BROOKLYN**
- **House Bill 5390, AN ACT CONCERNING WRITTEN INSTRUCTIONS AND OPINIONS FROM THE SECRETARY OF THE STATE**
- **House Bill 5391, AN ACT CONCERNING THE HANDLING OF VOTER AFFIDAVITS**
- **House Bill 5392, AN ACT CONCERNING TRAINING BY THE SECRETARY OF THE STATE REGARDING MOTOR VEHICLES LICENSES**
- **House Bill 5393, AN ACT CONCERNING ELECTION ADMINISTRATION**
- **House Bill 5394, ACT CONCERNING ENDORSEMENTS OF TOWN COMMITTEE MEMBERS.**
- **Senate Bill 250, AN ACT CONCERNING HOURS OF ELECTION DAY REGISTRATION**
- **Senate Bill 251, AN ACT CONCERNING REPORTING OF MUNICIPAL ELECTION RESULTS**
- **Senate Bill 252, AN ACT CONCERNING POST-ELECTION AUDIT INTEGRITY AND EFFICIENCY**

- **Senate Bill 254, AN ACT CONCERNING SATURDAY REGISTRARS OF VOTERS SESSIONS**
- **Senate Bill 255, AN ACT CONCERNING THE APPLICABILITY AND PROVISION OF TRAINING FOR REGISTRARS OF VOTERS**
- **Raised Bill 257, AN ACT CONCERNING REMOVAL FROM PARTY ENROLLMENT LISTS AND DENIAL OF PRIVILEGES**

Good morning Chairman Cassano, Chairman Jutila, Ranking Members McLachlan and Smith and members of the committee. My name is Denise Merrill and I am the Secretary of the State of Connecticut. I would like to address a number of bills before the committee this morning.

- **Raised Bill 5387, AN ACT CONCERNING THE CIRCULATION OF NOMINATING PETITIONS**

This bill would enable out-of-state residents to circulate petitions on behalf of candidates seeking placement on the ballot as the nominee of a petitioning party. I support this bill.

Under Connecticut law, candidates may appear on the ballot as nominees of a "major party," a "minor party" or as the nominee of a petitioning party. There are thresholds for each. For example, a major party is defined by its share of the whole number of votes cast for all candidates for Governor (20 percent) or having "a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of enrolled members of all political parties on the active registry list of the state."

So-called minor parties face similar, albeit lesser, thresholds, namely that their candidates for office received "at the last-preceding regular election for such office, under the designation of that political party or organization, at least one per cent of the whole number of votes cast for all candidates for such office at such election." (CGS Sec. 9-372(6)).

Candidates nominated by major and minor parties may be placed on election ballots without the prior approval of the Secretary of the State—in the latter's case—as long as the parties certify and file the candidates' nominations with the registrars of voters within a certain timeframe. In the case of a candidate attempting to get on the ballot as the nominee of a petitioning party, the candidate must collect signatures from registered Connecticut voters. The number of signatures needed equals the lesser of either "one per cent of the votes cast for the same office or offices at the last-preceding election... or (2) seven thousand five hundred" (CGS Sec. 9-453d) or with procedures described by Connecticut Gen. Statute 9-380 in the case of newly created offices.

A person who collects these signatures is called a circulator, defined as "a United States citizen, at least eighteen years of age and a resident of a town in this state and shall not be on parole for conviction of a felony," according to Connecticut Gen. Statute 9-453e.

The state currently faces litigation brought by the Libertarian Party. The Libertarian Party has qualified as a "minor party" for only a few public offices in the state, and thus must rely on the petitioning process to gain access to the ballot.

Similar residency requirements have been challenged in other states and several federal circuit courts of appeal held that these residency requirements violate first amendment rights of free association and free speech.

On January 26, the federal district court in New Haven granted a temporary restraining order to allow non-residents circulate Libertarian candidate petitions. Based on these facts, I urge support of the Raised Bill 5387.

I have attached a copy of the ruling for your consideration.

- **House Bill 5388, AN ACT CONCERNING THE TOWN SCHOOL COMMITTEE IN THE TOWN OF BROOKLYN**

I am not offering comments in favor or opposition to this bill but rather would only ask that we remain mindful of the minority representation statute, CGS 9-167a, to ensure that this proposal complies with its requirements.

- **House Bill 5390, AN ACT CONCERNING WRITTEN INSTRUCTIONS AND OPINIONS FROM THE SECRETARY OF THE STATE**

This bill would require my office, in the commission of my duties as chief elections official, to publish regulations, declaratory rulings, instructions and opinions in a permanent public archive on the Secretary of the State's website.

I support the intent of this bill, however, I must add some caveats.

Our office has a lengthy history of opinions and records that would—in a perfect world—be easily searched online. We do have a history of developing these kinds of systems, such as the eRegulations system. However, these kinds of systems obviously come with resource and funding needs.

We are very interested in adding our opinions online prospectively, and going back through the duration of my administration, and we are in the process of considering the best way to do so. In short, we will make sure very recent and future decisions are available online. However, a more sophisticated index and historical archive would require additional funding.

- **House Bill 5391, AN ACT CONCERNING THE HANDLING OF VOTER AFFIDAVITS**

This bill would render the votes of people who lack certain forms of identification provisional, potentially disenfranchising eligible voters. I oppose this bill.

This proposal is a considerable departure from existing state law. As the rules stand, if someone is registered, and they are on the list on Election Day, but lack certain forms of identification, they can sign an affidavit and cast a vote. This affidavit makes clear that falsely representing someone can be punishable with years of prison time, a fine and disenfranchisement. This bill proposes to make that vote provisional.

A person only casts an affidavit vote if they are registered and on the list at the polling place, whereas someone only casts a provisional vote if they are not on the list for some reason. There is no reason to render affidavit ballots provisional and potentially disenfranchise those voters.

The bill has a follow-up process that is not so clear. The bill suggests the Secretary of the State's office establish a procedure for auditing these ballots. There is less detail on what that entails. Are people to be summoned to validate their votes? What is the chance that people do this or are even able to do this? Presumably, those votes are then discounted and people are disenfranchised.

In any event, the current practice works well. We have not encountered problems so we do not see the rationale for this kind of change.

I oppose this bill.

- **House Bill 5392, AN ACT CONCERNING TRAINING BY THE SECRETARY OF THE STATE REGARDING MOTOR VEHICLES LICENSES**

This bill would require the Secretary of the State to train registrars of voters on the differences between a Drive Only motor vehicle license and other types of motor vehicle licenses.

I oppose this bill.

There are several reasons, one of which is that it is not necessary. When someone shows up to vote, and provides identification, they will only be allowed to vote if they have supplied appropriate identification, registered to vote and their name is on the list at the polling place. Our online voter registration system does not interact with the data bank of names in the Drive Only category so they would be unable to register that way.

My office is statutorily required to train on any new laws, which is what we currently do. We work with other agencies and would gladly partner with the Department of Motor Vehicles or any other agency to help clarify the different types of identification are issued, or the use of affidavits for that matter. However, I have some concerns about putting this level of specificity into statute.

If we mandate curricula lists for every new piece of legislation it will quickly become very lengthy and incomplete or out of date.

We do provide information to the registrars about identification requirements and the registrars, in turn, work with the moderators. In fact, there are now posters at all polling places articulating exactly what identification is acceptable. We are comfortable with the current arrangement.

Lastly, we have not received complaints about actual attempts to use Drive Only licenses at the polls. I oppose this bill.

- **House Bill 5393, AN ACT CONCERNING ELECTION ADMINISTRATION**

My office is putting forward this bill, which would simply change the deadline for online voter registration from 14 days before an election to one week. This would conform the deadline for online voter registration to the same deadline as in-person or mail-in registrations.

It is a small, sensible change and I hope you will support it.

- **House Bill 5394, ACT CONCERNING ENDORSEMENTS OF TOWN COMMITTEE MEMBERS.**

This bill would exempt candidates endorsed for election as town committee members from the requirement to sign the certification of such endorsement. I support this bill.

As we know, candidates for state and municipal office must sign a certificate of party endorsement under a recently enacted legislation. However, this has caused considerable inconvenience for the parties to gather the signatures of the thousands of local party officials in our state because town committee membership is a "municipal office" under Title 9.

This bill would rectify the issue and I hope you will support it.

- **Senate Bill 250, AN ACT CONCERNING HOURS OF ELECTION DAY REGISTRATION**

This bill would require anyone seeking to register to vote on Election Day to appear no later than 7 o'clock at the location where they may register to vote. I oppose this bill.

I should add that I want to see the issues that have led to voters being turned away corrected. I will never forget seeing UCONN students who were so excited to vote in 2008 turned away because they thought they were registered but they weren't. Many were enraged. Others wept. I thought of those students when we passed Election Day Registration because citizens should not be disenfranchised because of bureaucratic hurdles. Unfortunately, I think this proposal simply creates a new bureaucratic rule and doesn't solve the problem that it seeks to solve.

Demand for Election Day registration rises and falls according to the type of election. This November, we can predict high turnout and we will likely see intense demand for Election Day registration, and I can appreciate that the proponents of the bill are thinking ahead about how to effectively serve those voters. But we should also remember that next year, we won't see the same demand.

Anyone *registered* to vote and in line at the polling place by 8 p.m. has the right to cast a ballot on Election Day. The proposed bill would add an additional requirement to be in line for Election Day registration by 7 p.m. However, if someone is in line by 7 p.m. at the Election Day registration site and still not registered by 8 p.m., then that person would be turned away. If the objective is to give anyone who is in line to register by 7 p.m. the right to vote—regardless of whether that person is registered by 8 p.m.—then Sec. 9-174 would also have to also be adjusted. However, that could create disruption amongst the towns because in order to do a “cross check” under the EDR law, all elections operations would have to stay open until every town, and likely the largest cities, completed the line for Election Day Registration.

In many ways, we addressed this issue by permitting online voter registration to be used on Election Day.

We could prepare staff to help register people while they are in line at the Election Day registration location. Which brings us to the biggest issues we face, mainly that the registrars of voters need to have the staff, technology and budget that they need to serve the public. On average our towns and cities budget less than one-half of one percent for elections. Maybe that’s enough most of the time, but in a Presidential year those election officials may have to advocate for more.

Our greatest needs are funding for our elections in order to ensure that towns provide the registrars with what they need to carry out Election Day registration in their communities. Unfortunately, this well-intentioned bill does not address the greatest needs.

- **Senate Bill 251, AN ACT CONCERNING REPORTING OF MUNICIPAL ELECTION RESULTS**

This bill proposes adjusting the timeline and process by which the results of municipal elections are transmitted to the Secretary of the State’s office. We have no objections to this proposal.

Last year the General Assembly modified the process for state election years so that preliminary candidate totals were reported on election night and the turnout statistics and other required information was required to be submitted at a later date rather than election night. This bill implements the same structure for municipal elections.

- **Senate Bill 252, AN ACT CONCERNING POST-ELECTION AUDIT INTEGRITY AND EFFICIENCY**

This proposal alters the way post-election audits are carried out. I oppose this bill.

My office is currently on the verge of adopting new technology that would automate post-election audits. With a federal grant, we have developed a software in a partnership with UConn and purchased five scanners that we are in the process of customizing to meet our needs.

We recognize that towns can't budget for post-election audits because they are randomly selected. We hope our new initiative will give towns some relief.

This bill adds new requirements, including a hand-counting process that would be in addition to these new machines. That would seem to be duplicative in addition to promoting the perception that a newly adopted technology is incapable of independently evaluating a tabulator. It also would undermine an initial rationale for adopting this technology, which is to spare the towns' time and expense.

Moreover, the bill adds a new role to the Secretary of the State's office, which is to receive all detailed information from local authorities to put on our website, organized in each district by voting tabulator counts, manual counts, write-in counts and total number of voters checked on the official checklist, as well as by absentee ballot counts, election day registration counts and moderators' returns. This is a new function of our office and will require increased resources to execute.

- **Senate Bill 254, AN ACT CONCERNING SATURDAY REGISTRARS OF VOTERS SESSIONS**

This bill would eliminate a mandated Saturday session, the third week before the day of each state or municipal election, for registrars of voters to be available for enrollment and other services. I support this bill.

This statute provided a guarantee of public access to voter registration in a time when it was really needed. However, we now have the convenience of online voter registration and there is far less need for this mandatory session. This bill does retain the mandatory session on the week before Election Day and two weeks before primary day, which we feel is sufficient.

- **Senate Bill 255, AN ACT CONCERNING THE APPLICABILITY AND PROVISION OF TRAINING FOR REGISTRARS OF VOTERS**

This bill would eliminate my office's ability to delegate certain trainings for purposes of certification to a third party. I oppose this bill.

A major problem I have with this bill is that creates a very difficult situation with respect to trainings. Trainings are often needed with new pieces of technology, and the vendors are simply the best trainers. Under the proposal, it does not appear that we would be able to delegate to them. In addition, UCONN's School of Business currently carries out statutorily required certification training for all the towns' registrars of voters. We would be deeply concerned about the future of this program if this bill were to pass.

In addition, if all these trainings were moved in-house, there would be significant funding needs for my agency.

All that said, there is some confusion about the number of hours of training required. We had intended eight and are drafting language to that effect.

Otherwise, this bill raises many serious questions and I would urge you to oppose it.

- **Raised Bill 257, AN ACT CONCERNING REMOVAL FROM PARTY ENROLLMENT LISTS AND DENIAL OF PRIVILEGES**

This bill is a proposal from my office to eliminate what's commonly called "party purging statutes." The little-known statute is rarely used and frankly, I was surprised to learn of it. I ask you to support this bill.

The statute outlines how the registrar of voters is to initiate and facilitate a process of removing an enrolled member of the party for not being a good faith member of that political party or not intending to support its principles or candidates.

All of us have had to deal with persons in our parties that we felt weren't "real party members" and probably we believed were disruptive or dishonest. However, democracy is intended to be inclusive and promote some level of disruption.

We have a tradition of political dissent in this country and the major parties are well acquainted with managing dissent in their own groups. All of us can remember instances when our parties internally debated such varied subjects as LGBT rights, abortion or war and peace. Who is to say that activists are good or bad party members because they differ on these issues? To superimpose state-sanctioned party loyalty tests on these political debates conjures associations of thought police.

This proposal is not about any particular instances where it has been applied. It is about the principle and the many concerns that these laws raise.

For instance, the statutes put the registrars of voters in a hyper-politicized role. The registrars, while partisan in their selection, are legally bound to serve the public in a non-partisan and neutral way. For example, they serve the public with no regard to whether that resident is a member of their party or not. They are also expected to serve in a neutral way with respect to facilitating any primary or election. By placing the registrars in the center of the party removal process, it conflicts with their non-partisan position.

In addition, I am deeply troubled by the fact that an individual who is removed will be disenfranchised from voting in a primary. I understand that there is a certain amount of organizational integrity and identity that parties expect. However, that line is hard to draw, especially by the state, and should never be drawn in such a way that an individual's right to vote would be taken away. That is the effect in a state like ours where we have a closed primary system. We should also remember that in some cases the primary is, for intents and purposes, the election.

The parties could craft rules that somehow limit disruption from dissenters without the act of disenfranchising anyone. However, there is no need to enshrine them in statute and apply them

through agents of the government, especially an election official. Moreover, I do not think a difference of opinion should ever lead to disenfranchisement.

ATTACHMENT TO TESTMINOY OF SECRETARY MERRILL

RE: H.B. 5387 AAC THE CIRCULATION OF NOMINATING PETITIONS

United States District Court
District of Connecticut

Libertarian Party of Connecticut,

Plaintiff,

v.

Denise Merrill, Secretary of the State
of Connecticut,

Defendant.

Civil No. 3:15-cv-1851-JCH

Order on Plaintiff's Motion a Preliminary Injunction

On consideration of plaintiff Libertarian Party of Connecticut's motion for a preliminary injunction, *see* doc. no. 19, and for the reasons stated in the Court's ruling of January 26, 2016, *see* doc. no. 26, the Court grants the motion for a preliminary injunction and orders as follows:

- a Defendant is enjoined from applying Conn. Gen. Stat. § 9-453e to the extent that it prohibits non-Connecticut residents from serving as circulators;
- b Defendant is enjoined from applying Conn. Gen. Stat. § 9-453j to the extent that it requires nomination petitions to contain a certification that the circulator is a Connecticut resident;
- c Defendant is enjoined from applying Conn. Gen. Stat. § 9-453k to the extent that it prohibits Defendant, her agents, or any persons in active concert or participation with Defendant and her agents from accepting nominating petitions that do not contain the certification as to Connecticut residency required by § 9-453j; and
- d Defendant is enjoined from applying Conn. Gen. Stat. § 9-453o to the extent that it requires Defendant to reject any nominating petition that does not contain the certification as to Connecticut residency required by § 9-453j.

Dated: 2/16/2016

By the Court: /s/Janet C. Hall
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LIBERTARIAN PARTY
OF CONNECTICUT,
Plaintiff,

v.

DENISE MERRILL, SECRETARY
OF THE STATE OF CONNECTICUT
Defendant.

CIVIL ACTION NO.
15-CV-1851 (JCH)

JANUARY 26, 2016

**RULING RE: MOTION FOR A TEMPORARY RESTRAINING ORDER AND A
PRELIMINARY INJUNCTION (DOC. NO. 19)**

I. INTRODUCTION

The Libertarian Party of Connecticut (the "Libertarian Party" or the "Party") has moved for a temporary restraining order and a preliminary injunction enjoining Denise Merrill, the Secretary of the State of Connecticut (the "Secretary"), from enforcing sections 9-453e, 9-453j, 9-453k, and 9-453o of the Connecticut General Statutes. Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction (the "Motion") (Doc. No. 19).

The provisions at issue establish a residency requirement for individuals who act as circulators of nominating petitions for parties that qualify neither as major nor minor parties in elections held in Connecticut. The provisions also require the Secretary to reject any nominating petition that fails to confirm the residence of the circulator responsible for the petition. See Verified Amended Complaint for Declaratory and Injunctive Relief ("Verified Complaint") (Doc. No. 15) ¶¶ 19-21. The Party contends that these provisions violate the First Amendment and Fourteenth Amendments to the

United States Constitution, both on their face and as applied to the Party. Plaintiff's Corrected Memorandum of Law in Support of Its Motion ("Pl.'s Mem.") at 5-13.

The Secretary opposes the Motion. Defendant's Opposition to Plaintiff's Motion ("Opp.") (Doc. No. 20).

For the reasons set forth below, the Party's Motion is **GRANTED**.

II. **BACKGROUND**

The Libertarian Party of Connecticut is the recognized Connecticut affiliate of the national Libertarian Party. Verified Complaint ¶ 3. The national Libertarian Party is the third-largest political party in the United States, as measured by membership, popular vote in federal elections, and number of federal, state, and local candidates for office. Id. Candidates representing the Libertarian Party have run in every election cycle in Connecticut from 2010 to 2014, and the national Libertarian Party candidate has appeared on the Connecticut ballot for President and Vice President of the United States in six of the seven past presidential election cycles. Verified Complaint ¶ 6.

Under Connecticut law, a candidate for public office may appear on an election ballot as having been nominated by a major party, as having been nominated by a minor party, or as being affiliated with neither a major nor a minor party. Conn. Gen. Stat. § 9-379. For purposes of this Ruling, a party that is neither a major nor a minor party will be called a "petitioning party." A "major party" is defined as:

(A) [A] political party or organization whose candidate for Governor received, under the designation of that political party or organization, at least twenty per cent of the whole number of votes cast for all candidates for Governor, or (B) a political party having, at the last-preceding election for Governor, a number of enrolled members on the active registry list equal to at least twenty per cent of the total number of

enrolled members of all political parties on the active registry list of the state.

Conn. Gen. Stat. § 9-372(5). A "minor party" is defined as:

[A] political party or organization which is not a major party and whose candidate for the office in question received at the last-preceding regular election for such office, under the designation of that political party or organization, at least on per cent of the whole number of votes cast for all candidates for such office at such election.

Conn. Gen. Stat. § 9-372(6).

Candidates for public office that have been nominated by a major party may be placed on election ballots without prior approval of the Secretary. See Conn. Gen. Stat. §§ 9-388, 9-390. Candidates belonging to minor parties may be listed on election ballots without the Secretary's prior approval provided their respective parties certify that the candidates are their parties' nominees. See Conn. Gen. Stat. § 9-452. Should a candidate seek placement on the ballot as the nominee of a petitioning party, he must gather signatures on a nominating petition approved by the Secretary. Conn. Gen. Stat. §§ 9-379 and 9-453a-p. With regard to all but three public offices in Connecticut,¹ the Libertarian Party of Connecticut is neither a major nor a minor party and must comply with the petitioning process to place a candidate on a ballot. Verified Complaint ¶ 17.

The nominating petition must be supported by the signatures of registered Connecticut voters. Conn. Gen. Stat. § 9-453d. The number of signatures required is the lesser of 7,500 or "one per cent of the votes cast for the same office or offices at the last-preceding election, or the number of qualified electors prescribed by [Conn. Gen. Stat.] § 9-380 with regard to newly created offices." Conn. Gen. Stat. § 9-453d.

¹ The Party qualifies as a "minor party" with respect to the 20th State Senate District, the 2nd United States Congressional District, and the United States Senate. Verified Complaint ¶ 17.

An individual who collects signatures on a candidate's nominating petition is called a "circulator." Conn. Gen. Stat. § 9-453e. Under Connecticut law, among other qualifications, a circulator must "be a United States citizen . . . and a resident of a town in this state." Id. The circulator's status as a resident of the State of Connecticut must be attested to in the petition that is submitted to the Secretary for approval, and the circulator must sign the attestation under penalty of perjury. Conn. Gen. Stat. § 9-453j. The statement is also required to "set forth . . . such circulator's residence address, including the town in this state in which such circulator is a resident." Id.

Section 9-453o further provides that the Secretary:

may not count for purposes of determining compliance with the number of signatures required by section 9-453d the signatures certified by the town clerk on any petition page filed under 9-453a to 9-453s, inclusive, or 9-216 if . . . the page does not contain a statement by the circulator as to the residency in this state and eligibility of the circulator and authenticity of the signatures thereon as required by section 9-453j or upon which such statement of the circulator is incomplete in any respect[.]

Conn. Gen. Stat. § 9-453o(a)(2). This provision effectively precludes the use of nominating petitions prepared by circulators whose residence is outside the State of Connecticut. See Verified Complaint ¶¶ 22-23.

The Party contends that the provisions at issue impose an unconstitutional burden on core political speech, in violation of the First and Fourteenth Amendments to the United States Constitution, because they do not constitute a narrowly tailored means to accomplish a compelling state purpose. Pl.'s Mem. at 6-8. The Party also contends that the provisions increase the cost of obtaining adequate signatures on nominating petitions by prohibiting the Party from contracting with cheaper and more

effective out-of-state circulators, thereby restricting available funds for campaigning.

Verified Complaint ¶¶ 25-27.

The Secretary contends that the statute is constitutional because it either adheres to a lesser degree of scrutiny or, should strict scrutiny apply, it is narrowly tailored to address the compelling state interests of curbing voter fraud and “resolv[ing] pre-election questions and disputes involving candidates, election officials[,] and electoral competitors in time to avoid any impact on the election calendar.” Opp. at 12.

III. STANDARD OF REVIEW

A party seeking to obtain a preliminary injunction must demonstrate (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tip in its favor, and (4) that an injunction is in the public interest. New York Progress and Protection PAC v. Walsh, 733 F.3d 483, 486 (2013) (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). In the First Amendment context, the likelihood of success on the merits is the “dominant, if not dispositive, factor.” Id. at 488.

Where the requested preliminary injunction “would stay government action taken in the public interest pursuant to a statutory or regulatory scheme” and alter, rather than maintain, the status quo, the party must demonstrate a “substantial” or “clear” likelihood of success on the merits, or that “extreme or very serious damage will result from a denial of preliminary relief.” Id.; see also Bronx Household of Faith v. Bd. of Ed. of the City of New York, 331 F.3d 342, 349 (2d Cir. 2003); Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc., 60 F.3d 27, 34 (2d Cir. 1995).

Facial challenges to state statutes under the First Amendment to the United States Constitution are governed by the “overbreadth doctrine.” See, e.g., National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998). Under that doctrine, a plaintiff need not demonstrate that “no set of circumstances exists under which the [statute] would be valid,” as would normally be required outside the First Amendment context, see United States v. Salerno, 481 U.S. 739, 746 (1987), but rather the plaintiff “need only demonstrate a substantial risk that application of the provision will lead to the suppression of speech.” Lerman v. N.Y.C. Bd. of Elections, 232 F.3d 135, 143 (2d Cir. 2000) (quoting Finley, 524 U.S. at 580); see also Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973) (holding that statutes restricting First Amendment rights may be facially invalid if the impermissible applications of the law are substantial when “judged in relation to the statute’s plainly legitimate sweep”). The Supreme Court has expressly found that the overbreadth doctrine, and not the Salerno standard, applies to First Amendment challenges. Salerno, 481 U.S. at 745.

IV. DISCUSSION

A. Standing

The United States Constitution provides, inter alia, that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution.” U.S. Const. art. III, § 2. For a litigation to constitute a “Case” within the meaning of Article III, and consequently for subject matter jurisdiction to exist, the plaintiff must “establish that [it has] standing to sue.” Clapper v. Amnesty Int’l USA, 133 S. Ct. 1138, 1146 (2013) (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)). Though the parties have not raised the issue, standing is a jurisdictional prerequisite that the court must address before

reaching the merits of the instant dispute. See, e.g., All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 85 (2d Cir. 2006). “[A] district court must generally . . . establish that it has federal constitutional jurisdiction, including a determination that the plaintiff has Article III standing, before deciding a case on the merits.” Id. (citing Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 101 (1998)).

“To establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” Clapper, 133 S. Ct. at 1147 (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010)). A threatened injury must be “‘certainly impending to constitute injury in fact,’” id. (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)); the imminence element of standing “cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes,” id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 565 n.2 (1992)). “Literal” certainty that the harms a plaintiff fears are impending, however, may not be required: where there is a “substantial risk” that a harm will occur, prompting a plaintiff to reasonably incur costs to mitigate or avoid that harm, standing may be found. Id. at 1150 n.5; see also Hedges v. Obama, 724 F.3d 170, 195-96 (2d Cir. 2013).

Two types of injuries may confer Article III standing for First Amendment challenges. The first occurs when “the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution.” Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289, 298 (1979); Blum v. Holder, 744 F.3d 790, 796 (1st Cir. 2014) (discussing the two main categories of First Amendment injury creating

Article III standing). The second occurs when a plaintiff is “chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences.” Blum, 744 F.3d at 796 (internal quotation marks and citation omitted); see also Nat’l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 689 (2d Cir. 2013) (“What mattered [in a First Amendment suit challenging a non-criminal statute] was that the plaintiff faced a ‘credible threat’ that the law would be enforced against it. . . . That was enough to give standing.”) and Vermont Right to Life Comm., Inc. v. Sorrell, 221 F.3d 347 F.3d 376, 382 (2d Cir. 2000) (same). “A plaintiff must allege something more than an abstract, subjective fear that his rights are chilled in order to establish a case or controversy. . . . But a real and imminent fear of such chilling is enough.” Walsh, 714 F.3d at 689 (internal citation omitted); see also Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2342 (a First Amendment plaintiff “satisfies the injury-in-fact requirement where [it] alleges an intention to engage in a course of conduct . . . proscribed by a statute, and there exists a credible prosecution thereunder”) (internal quotation marks and citations omitted).

Connecticut law provides that the Secretary “may not count for purposes of determining compliance with the number of signatures required” by law, any petition page that does not contain a complete statement proving the residency, in the State of Connecticut, of the circulator responsible for the petition. Conn. Gen. Stat. § 9-453o(a). The Party’s Verified Complaint alleges that it would employ out-of-state circulators to gather signatures for its nominating petition. Verified Complaint ¶ 32. Further, nothing in the Secretary’s papers suggests that she will not carry out the letter of this provision.

Indeed, counsel for the Secretary conceded at oral argument that the Secretary considers section 9-453o as mandatory.

The Party has a right to association, Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215-16 (1986), and the circulation of ballot access petitions—whether for the nomination of candidates or for other initiatives, see Lerman v. N.Y.C. Bd. of Elections, 232 F.3d 135, 146 (2d Cir. 2000)—constitutes “core political speech,” Meyer v. Grant, 486 U.S. 414, 422 (1998).² The Party has, consequently, evinced an intention “to engage in a course of conduct arguably affected with a constitutional interest,” Babbitt, 442 U.S. at 298, and the Secretary has evinced an intention to enforce a law that renders that course of conduct illegal. Id.

In light of the foregoing, the Party faces a “credible threat,” Babbitt, 442 U.S. at 298, that the circulator residency requirement will be enforced against it and, to the extent that the use of circulators constitutes First Amendment activity, its First Amendment rights are accordingly chilled. See Walsh, 714 F.3d at 689. Indeed, at oral argument, the Secretary appeared to concede that the Party had standing, particularly in light of the Party's Supplemental Affidavit (Doc. No. 21-1), which indicates the Party's intention to “run a candidate for the 2016 presidential election,” and its desire “to use out-of-state circulators to gather the number of signatures necessary to place [its] presidential candidate on the 2016 ballot.” Id. ¶¶ 2-3.

Because the Party has more than a subjective fear of imminent injury, in the form of the chilling of its First Amendment rights and increased costs associated with in-state

² The question of whether the circulation of nominating petitions constitutes protected “core political speech” is discussed in greater detail below. See infra at 10-12. For standing purposes, it suffices that such activity “arguably [is] affected with a constitutional interest.” Babbitt, 442 U.S. at 298.

circulators, Greerston, 561 U.S. at 154, the Party has standing to sue. Consequently, this litigation presents a “case or controversy” within the meaning of Article III.

B. The Likelihood of Success on the Merits of the Libertarian Party’s Challenge to Sections 9-453e, 9-453j, 9-453k, and 9-453o

1. Determining the Degree of Scrutiny

The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I (the “Abridgment Clause”). The Abridgment Clause further protects the “freedom to engage in association for the advancement of beliefs and ideas.” NAACP v. Alabama ex rel. Patterson, 347 U.S. 449, 460 (1958). This right extends to “partisan political organizations” and protects “the associational rights of [political p]art[ies] and [their] members.” Tashjian, 479 U.S. at 215-16.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without the due process of law.” U.S. Const. amend. XIV. The Abridgment Clause “expresses one of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . and, as such, is embodied in the concept ‘due process of law’ [of the Fourteenth Amendment] . . . and, therefore, [is] protected against hostile state invasion by the due process clause of the Fourteenth Amendment.” Grosjean v. American Press Co., 297 U.S. 233, 245 (1936).

The United States Constitution further provides that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof,” U.S. Const. Art. I, § 4, cl. 1, and consequently the Supreme Court has recognized that “States retain the power to regulate their own

elections.” Burdick v. Takushi, 504 U.S. 428, 433 (1992). To balance the citizens’ rights under the Abridgment Clause with the State’s rights to regulate their own elections, the Supreme Court has instructed that “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate [must be weighed] against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.” Id. at 434 (internal quotation marks and citations omitted). Though Burdick articulates a “sliding scale” degree of scrutiny, the Court has also made clear that “severe burdens” must withstand strict scrutiny to survive. See, e.g., Buckley v. Amer. Const. Law Found., 525 U.S. 182, 192 n.12 (“Our decision is entirely in keeping with the now-settled approach that state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest.”) (internal quotation marks, brackets, and citation omitted).

Consequently, when a plaintiff challenges a state election law for violation of a First Amendment right, the court must first determine the degree of judicial scrutiny to be applied. See, e.g., Price v. N.Y. State Bd. of Elections, 540 F.3d 101, 108 (2d Cir. 2008). The act of gathering signatures from potential voters on a ballot access petition, such as the nomination petitions at issue in this case, constitutes “interactive communication concerning political change.” Meyer, 486 U.S. at 420 (discussing a ballot access petition for a constitutional referendum). Such activity “will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.” Id. at 421. The Supreme Court has conclusively held that such activity is “core

political speech,” the restriction of which constitutes a “severe burden” warranting strict scrutiny. Id. at 422; see also Lerman, 232 F.3d at 146 (holding that the speech engaged in by those gathering signatures for ballot access petitions is “identical” to the petitions circulated in Meyer). “[I]n those cases in which the regulation clearly and directly restricts ‘core political speech,’ as opposed to the ‘mechanics of the electoral process’ . . . application of strict scrutiny clearly will be necessary.” Id. at 146.

The Secretary suggests that the residency requirement at issue does not “severely burden” the Party’s free speech rights, such that strict scrutiny is not called for. Opp. at 9. However, the weight of authority in this Circuit persuades the court decisively to reject the Secretary’s position.

In Lerman, the Second Circuit was asked to pass upon the constitutionality of a New York election law that required that witnesses to signatures on ballot access petitions be residents of the political subdivision in which the office was to be voted upon. 232 F.3d at 138-39. Though distinguishable from the instant case in that it mandated residence in the political subdivision, rather than the state, thereby creating a more limited pool of potential witnesses, the basic statutory restriction was the same. The court unequivocally held that restrictions “drastically reducing the number of persons available to circulate petitions” severely burdened the core political speech at issue in the case. Id. at 146 (internal quotation marks and ellipses omitted) (citing Buckley, 525 U.S. at 193 (1999)); see also Buckley, 525 U.S. at 210 (Thomas, J., concurring) (strict scrutiny applies where restriction on petition circulation “reduces the voices available to convey political messages”).

The Secretary contends that the Party must “adduce facts to prove a fuller picture of its claim of a severe burden.” Opp. at 10. The Party’s Verified Complaint explains in detail the increased costs associated with in-state petition circulators, Verified Complaint ¶¶ 25-27, and the court may take judicial notice of the fact that, in a country of nearly 320,000,000, a statute that restricts the pool of potential circulators to the population of Connecticut – approximately 3,500,000 – necessarily “reduces the voices available to convey political messages.”³ Buckley, 525 U.S. at 210.

Consequently, the court will apply strict scrutiny to sections 9-453e, 9-453j, 9-453k, and 9-453o.

2. Application of Strict Scrutiny

Once strict scrutiny has been applied, the laws at issue are presumed unconstitutional, Cal. Dem. Party v. Jones, 530 U.S. 567, 582 (2000), and the burden is on the defendant to prove that the laws—a residency requirement for circulators of nominating petitions—are narrowly tailored to achieve a compelling state interest. See, e.g., Burdick, 504 U.S. at 434. The Secretary has failed to carry this burden at this stage.

In her Opposition, the Secretary points to two compelling state interests: first, the interest in limiting fraud in the process of obtaining signatures of nominating petitions, and second, the state’s interest in the orderly administration of elections. Opp. at 11-12. The first of these has been confirmed by the Second Circuit as a compelling interest,

³ This comparison is, of course, entirely approximate; for example, it accounts for minors and felon parolees (individuals who are also excluded from being circulators under Conn. Gen. Stat. 9-453e). At this preliminary stage of the proceedings, however, the general point is sufficient: the in-state residency requirement drastically, and necessarily, limits the possible pool of circulators who might otherwise be available to circulate nomination petitions on behalf of the Party.

see Lerman, 232 F.3d at 149; the court will assume arguendo at this stage that the second of these is a compelling state interest. However, the Secretary has failed to bring forward evidence that the residence requirement is narrowly tailored to further either interest.

Annexed to the Secretary's Opposition is an Affidavit of a staff attorney for the State Election Enforcement Commission ("SEEC"), William Smith. See Affidavit of William Smith ("Smith Affidavit") (Doc. No. 20-1). In it, he summarizes "several matters that the SEEC has investigated that involved out-of state circulators in Connecticut." Id. ¶ 4. However, only three of the five investigations concern out-of-state circulators at all. See id. ¶¶ 5-9. Of those three, one concerned difficulties, not with preventing voter fraud or ensuring the orderly administration of elections, but rather with the enforcement of the uncontested provision requiring that petitions be certified by witnesses to the signatures; and the second uncovered no evidence that the out-of-state participant had, in fact, engaged in circulation.⁴ Id. ¶¶ 5-6. The third investigation was resolved with no finding of fraud, and the out-of-state participants are not alleged to have even been circulators, but rather "coordinators of the petitioning drive." Id. ¶ 7. Even under the current statutory system, nothing prohibits an out-of-state person from coordinating a petition drive—the person is only prohibited from personally attesting to the validity of

⁴ "In the matter of Donna Donovan . . . the SEEC investigated whether [Connecticut residents] working on behalf of a petitioning candidate for the office of the President of the United States violated Connecticut petitioning statutes because they relied upon instructions from out-of-state organizers and illegally certified nominating petition pages that had been collected by out-of-state college students on behalf of the Presidential candidate. . . . In the matter of James Bancroft . . . the SEEC investigated whether a candidate had improperly employed out-of-state circulators to gather petition signatures but concluded that two circulators had registered to vote in Connecticut before commencing circulating and the third individual, from Helena, Montana, could not be conclusively determined to have actually circulated any nominating petitions." Smith Affidavit ¶¶ 5-6.

the signatures contained in a petition. See Conn. Gen. Stat. § 9-453j. Thus, this investigation is also irrelevant.

As other courts have recognized when faced with similar statutes, a more narrowly tailored means to achieve the Secretary's goals of minimizing fraud and ensuring that circulators be present for pre- and post-election hearings, would be simply to condition their participation in petition circulation on their submitting to Connecticut's jurisdiction and timely attendance at hearings. See Citizens in Charge v. Gale, 810 F. Supp. 2d 916, 926-27 (D. Neb. 2011) (collecting cases). Counsel for the Secretary conceded as much at oral argument. Indeed, she indicated that failure to submit to Connecticut's jurisdiction in a timely manner can, under current practice, result in the invalidation of the circulator's petition.

At this stage of the case, the Secretary has yet to proffer evidence suggesting that the circulator residency requirement is narrowly tailored to achieve a compelling state interest. The court concludes that the Party is substantially likely to succeed on the merits of a facial challenge to the statutes at issue because it has clearly demonstrated "a substantial risk that application of the provision will lead to the suppression of speech." National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).⁵

C. Irreparable Harm, Equities, and the Public Interest

As noted in Walsh, the likelihood of success on the merits is the "dominant, if not the dispositive, factor" in determining whether the court should grant preliminary relief in

⁵ In light of the result of this Ruling, it is unnecessary to determine whether the Party is substantially likely to succeed on the merits of their claim that the statutes at issue are unconstitutional as applied to the Party.

a First Amendment case. Id. at 488. This is because, generally, if a party is substantially likely to succeed on the merits of a First Amendment claim, the other factors to be considered in determining whether to grant preliminary relief fall into place in light of the gravity of a possible First Amendment violation. As for the requirement for irreparable injury, “[t]he loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 353 (1976). Given the seriousness of the harm, and the fact that the Secretary has not contended that suspending enforcement of the relevant provisions would impose a burden on her, the equities tip in favor of the Party. Finally, as to the requirement that the relief be in the public interest, the Second Circuit recently affirmed that “securing First Amendment rights is in the public interest.” Walsh, 733 F.3d at 488.

Accordingly, the court concludes that preliminary relief is appropriate in this case. The Party’s Motion is granted. As the Secretary agreed at oral argument, given that this litigation is in the public interest insofar as it seeks to vindicate the public’s First Amendment rights under the Abridgment Clause, the Party is not required to post a bond under Federal Rule of Civil Procedure 65(c). See, e.g., Pharm. Soc. of N.Y. v. N.Y. Dep’t of Soc. Servs., 50 F.3d 1168, 1175 (2d Cir. 1995).

V. CONCLUSION

For the reasons set forth above, the Libertarian Party’s Motion for a Preliminary Injunction and Temporary Restraining Order is **GRANTED**.

SO ORDERED.

Dated this 26th day of January, 2016, at New Haven, Connecticut.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge

